No. 84-1662

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In the Supreme Court of the United States

OCTOBER TERM, 1984

DAVID GOLDBERG AND JOSEPH YORIZZO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Petitioners contend that the court of appeals erred in vacating an order dismissing two counts of an indictment.

On November 17, 1983, petitioners and Kenneth S. Dreifus were charged in the first count of a four-count indictment returned in the United States District Court for the Southern District of New York with conspiracy to violate the currency reporting requirements of the Bank Secrecy Act, 31 U.S.C. 5311 *et seq.*, in violation of 18 U.S.C. 371. Petitioner Goldberg was also charged with possession of an unregistered firearm, in violation of 26 U.S.C. 5861 and 5871 (count 2), carrying a firearm in the commission of the felony alleged in count 1, in violation of 18 U.S.C. 924(c)(2) (count 3), and obstruction of justice, in violation of 18 U.S.C. 1503 (count 4). On May 21, 1984, the district court dismissed counts 1 and 3 on the ground that the conduct

alleged did not trigger any requirement under the Act or its implementing regulations that defendants file currency transaction reports (Pet. App. 22a-37a; 587 F. Supp. 302).[1] The district court concluded that the defendants' currency transactions did not bring them within the definition of a "financial institution" with a duty to make reports of currency transactions (Pet. App. 26a-33a) and that they did not have any interest in a foreign interest-bearing account giving rise to a reporting requirement (*id.* at 33a-34a).

The court of appeals vacated and remanded (Pet. App. 1a-21a; 756 F.2d 949). It held that the indictment adequately alleged activities that, if proven, would permit the jury to find that defendants jointly engaged in the business of dealing in currency and that they constituted a financial institution as defined in 31 U.S.C. 5312 and the applicable regulations (Pet. App. 9a-18a). The court of appeals also ruled that the indictment adequately alleged that defendants conspired to aid and abet another person in failing to report an interest in a foreign bank account (*id.* at 18a-21a).

Petitioners contend (Pet. 10-15) that the court of appeals erred in concluding that they may, by engaging in concerted activity involving currency transactions, come within the definition of a financial institution under the Act. Whatever the merits of petitioners' contentions, they are not presently ripe for review by this Court.[2] The court of appeals' decision places petitioners in precisely the same position they would have occupied if the district court had denied their motion

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[1]Count 2 was not dismissed (Pet. App. 37a). Count 4 was dismissed on the ground that it was insufficiently pleaded (*id.* at 35a-37a). The government did not appeal the dismissal of count 4.

[2]It is now over 17 months since the return of the indictment and almost 12 months since the district court's order. Interlocutory review at this time would cause additional delay in the trial of the charges against petitioners.

to dismiss. If petitioners are acquitted following a trial on the merits, their contentions will be moot. If, on the other hand, petitioners are convicted and their convictions are affirmed on appeal, they will then be able to present their contentions to this Court, together with any other claims they may have, in a petition for a writ of certiorari seeking review of a final judgment against them. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MAY 1985

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[2]Because this case is interlocutory, we are not responding to the merits of the question presented by the petition. We will file a response on the merits if the Court requests.